

The Escazú Agreement: an ambitious example of a multilateral treaty in support of environmental law?

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In June 1992 the United Nations Conference on Environment and Development adopted a declaration to strengthen the concept of countries' rights and responsibilities in the environment and development field. Principle 10 of the Rio Declaration on Environment and Development, adopted in 1992,¹ clearly emphasizes the importance of public participation (active participation, access to information and access to justice) for addressing environmental issues.

Initiated twenty years later at the United Nations Conference on Sustainable Development (Rio+20) in 2012, the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*² was adopted in Escazú (Costa Rica) on 4 March 2018 after two years of preparatory meetings and four years of negotiations, which involved significant public participation. This is the only binding agreement from Rio+20 and the first environmental agreement adopted by the Latin America and Caribbean region.

As the international community reflects on the possible options for enhancing the effectiveness of international environmental law in the framework of the negotiations for a possible Global Pact for the Environment, the Escazú Agreement deserves attention, both for its content and also for the process that led to its inception.

1 <http://www.un.org/documents/ga/conf151/aconf15126-1.htm>

2 https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf

KEY MESSAGES

The first binding agreement from Rio+20, the Escazú Agreement represents a breakthrough in international environmental law in Latin America and the Caribbean, particularly in terms of the application of Principle 10 of the Rio Declaration. Based on the principle of sustainable development, the agreement underlines the interdependence between human rights and the environment and specifically mentions the protection of human rights defenders in environmental matters. It also enshrines certain key principles such as non-regression and progressivity.

Reaching this agreement required a major effort in terms of awareness raising and providing

explanations to States. It is the culmination of a two-year preparatory phase and nine intensive meetings of its Negotiating Committee, which involved several workshops and the mobilization of regional and international expertise.

Active public participation in the negotiations has been critical to maintain a high level of ambition and to enable the addition of key dimensions in the text that were not originally planned. Government delegates, representatives of the public and academia, experts and other stakeholders met and collaborated during the negotiations.

1. A REGIONAL TREATY TO STRENGTHEN ENVIRONMENTAL DEMOCRACY

1.1. Towards a more effective implementation of Principle 10 of Rio+20

From the outset of the inter-State discussions, the goal was to achieve effective implementation of Principle 10 in the Latin America and Caribbean region. Indeed, the agreement adopted at Escazú aims to guarantee the right of all individuals to access information in a timely manner, to participate meaningfully in decisions that affect their lives and their environment, and to have access to justice if these rights are violated. It thus establishes obligations of cooperation between States and their citizens, but also between States, in terms of cooperation and capacity building. Its primary value lies in its multilateral nature, adding vertical obligations to existing national obligations and promoting cooperation and capacity building of the least advanced countries in the field.

Among its main provisions, the Escazú Agreement recognizes the right of every person to live in a healthy environment, and the obligation to ensure that the rights defined in the Agreement are freely exercised. It provides for the adoption of legislative, regulatory, administrative and other measures to ensure the implementation of the Agreement, the provision of information to the public to facilitate the acquisition of knowledge on access rights, and the duty to provide guidance and assistance to the public, especially to vulnerable people and groups. Regarding implementation of the Agreement, one of the strategies adopted to advance the negotiations was to maintain a certain ambiguity regarding the expected outcome of the discussions, which was only decided at the end of the process, in favour of a binding agreement.

1.2. A duplication of the Aarhus Convention?

At first glance, the Escazú Agreement seems to contain similar provisions to those of the Aarhus Convention,³ which was signed by 39 countries in the European region and that gives members of the public (both individuals and the associations who represent them) the right of access to information and to participate in environmental decision-making processes, as well as the right to demand compensation if these rights are not respected. However, Escazú's text contains several provisions that are specific to the Latin America and Caribbean region, such as the protection of human rights defenders in environmental matters, and of individuals and groups in vulnerable situations.

Article 3 of the Agreement sets out a list of environmental principles: (a) principle of equality and non-discrimination; (b) principle of transparency and accountability; (c) principle of non-regression and progressive realization; (d) principle of good faith; (e) preventive principle; (f) precautionary principle; (g) principle of intergenerational equity; (h) principle of maximum disclosure; (i) principle of permanent sovereignty of States over their natural resources; (j) principle of sovereign equality of States; and k) principle of pro persona.

While most of these are well-established principles of international environmental law, the pro persona principle has been extrapolated from regional human rights law, based on the pro homine principle of the human rights protection system of the Organization of American States (OAS).⁴ This pro homine principle calls for human rights standards to be interpreted in a way that is "most favourable to the human person and protects human dignity". According to this rationale, the pro persona principle creates better guarantees for the rights of victims of human rights violations, and sends a signal to States about their future behaviour.⁵

While transparency and accountability are widely recognized in international environmental law, the principle of non-regression (not present in any legislation of the countries in the region) and progressive realization is relatively new in the context of international environmental law. Its inclusion represents a step forward.

In the framework of the Aarhus Convention, the guarantee of access to justice is provided only for violations of rights directly related to the subject of the agreement (access to information or participation); this commitment is much more comprehensive in the Escazú Agreement, guaranteeing not only access to justice for the denial of information or the inability to participate in decision-making processes, but also for "any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment" (Article 8.2c).

The Escazú Agreement goes further in several other areas: it provides global legitimacy for environmental protection and the need for effective, timely, public, transparent, impartial and affordable procedures; it allows the possibility of taking precautionary and provisional measures, measures that facilitate accusers regarding providing evidence of environmental damage (reversal of the burden of proof and the dynamic burden of proof); and it incorporates remedial mechanisms (restitution of conditions prior to damage, restoration, compensation or payment of an economic sanction, satisfaction, guarantees of non-repetition, the assumption of responsibility of the affected persons and the financial instruments to support such remedies).

³ https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=XXVII-13&chapter=27&lang=en

⁴ Olmos Giupponi, B. (2019). Fostering environmental democracy in Latin America and the Caribbean: An analysis of the Regional Agreement on Environmental Access Rights. *RECIEL*. 2019;00:1-16.

⁵ Steven Wheatley, *The Idea of International Human Rights Law*, Oxford, 2019.

However, in some areas, the agreement is less precise or even vague, leaving countries with more manoeuvre room than the Aarhus Convention, in particular for those categories of information for which a refusal of access can be justified. The definition of these categories may vary from country to country according to national legislation.

1.3. Sustainable development and equality

The Escazú Agreement combines environmental protection with equality and places the latter notion, in its preamble, at the heart of sustainable development. It is clearly stated in the agreement that the rights of access to the environment are rooted in "*the right of every person of present and future generations, to live in a healthy environment and to sustainable development*". The Escazú agreement is fully in-line with the spirit of the 2030 Sustainable Development Agenda, adopted in 2015, and the commitment to "*leave no one behind*". It provides specific means for individuals and groups in vulnerable situations and aims to overcome obstacles to exercising the right of access to environmental information and to prevent all forms of discrimination.

1.4. A human rights treaty

The Escazú Agreement is also a human rights treaty. It is the first treaty in the world to include provisions on human rights defenders in environmental matters (Article 9). This world first is far from trivial in one of the world's regions most affected by social-environmental conflicts and where there are increased risks to the lives and safety of individuals and groups who act as human rights advocates in environmental matters. Throughout the text, environmental rights are rooted in the protection of human rights. The foreword contains several references to international human rights law. This has practical implications, since the Agreement can be invoked and enforced through the human rights protection system of the OAS, which aims to defend and promote fundamental rights and individual freedoms in the Americas.⁶

2. REASONS BEHIND A SUCCESSFUL NEGOTIATION

2.1. Strong expectations

Since 1992, Latin American and Caribbean countries have invested heavily in creating and strengthening institutions and in enacting legislation on environmental issues, but without challenging non-sustainable production and consumption patterns; there is also a growing number of socio-environmental conflicts

related to the use and extraction of natural resources.⁷ In this context, citizens have started to call for development that guarantees social and economic progress as well as environmental sustainability. The Escazú negotiation process was a response to the demands of these citizens for greater equality, inclusion and participation in decision-making in matters related to the environment and the quality of life in the region.

2.2. Leader countries and a clear roadmap

For such a process to emerge, a strong mobilization of several countries was essential. Chile was one of the countries initiating this process. Having joined the OECD in 2010, the Chilean government wanted to strengthen environmental democracy (information, participation and access to justice), and at that point considered joining the Aarhus Convention. The country, supported particularly by Costa Rica, Uruguay and Mexico, then chose to support the establishment of a regional process to implement Principle 10 of the Rio Declaration.

In June 2012 on the initiative of Chile, ten countries (Costa Rica, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, Dominican Republic and Uruguay) signed a declaration on the application of Principle 10. These countries clearly acknowledged the role of States in the application of the principle, by seeking to "facilitate and promote education, awareness-raising and public participation by making information widely available and providing effective access to the proceedings outlined above". To achieve this, the signatory countries committed themselves to "examining the possibility of developing a regional instrument that could take the form either of guidelines, workshops or good practices, or a regional convention open to all countries of the region, truly involving all interested citizens."

2.3. Importance of establishing a shared analysis

A great deal of preparation was needed before negotiations could begin. The idea, supported by the Economic Commission for Latin America and the Caribbean (ECLAC), was to carry out a shared analysis at the regional level on the state of public participation in decisions affecting the environment. The declaration of the ten countries laid a clear foundation by committing to prepare and implement, with technical support from ECLAC, a 2012-2014 action plan to develop a convention or other regional instrument. Several international experts were also mobilized to provide further insights, in particular on the Aarhus Convention with the support of the United Nations Economic Commission for Europe.

At the end of this preparatory stage, the countries of the region agreed, in the Santiago decision, to move towards a

⁶ Olmos Giupponi, B. (2019), *op. cit.*

⁷ De Miguel, C. y Torres, V., "América Latina y el Caribe: avanzando hacia el desarrollo sostenible mediante la aplicación del principio 10 de la Declaración de Río", Informe Ambiental 2016, FARN, Buenos Aires, 2016, pp. 66 y 67.

better implementation of Principle 10 and to explore different ways to do so with the active collaboration of the public.

A Negotiation Committee, with the support of ECLAC as a technical secretariat, was established, consisting of 24 countries from the region, and to which the public has been actively involved. In addition, countries have requested ECLAC to prepare a preliminary document on the regional instrument to initiate discussions. All other countries in the region, if they so wished, had the opportunity to attend discussions as observers.

2.4. Active and decisive public participation

The negotiation sessions were open to the public, who were able, either in person or remotely, to make contributions, express concerns, indicate needs and difficulties, or provide data and information to enable government representatives to advance negotiations with a better knowledge of the issue to be addressed, and with greater confidence in the usefulness of the regional agreement for their respective countries, as well as for the creation of common standards for the region. Through processes of national consultation implemented in addition to the negotiation meetings, most countries have tried to broaden the base of the actors involved in the process and its dissemination.

While organized actors, such as the Access Initiative network, played an important role throughout the process, this participation did not only involve civil society organizations, but also aimed at involving the wider public, without restrictions. This required some adjustment and representatives were elected by electronic vote. In addition to attending the discussions between the countries, they were able to formulate concrete proposals for the Agreement's text, provided that at least one country agreed to discuss the proposal. This effective public participation, while in some ways slowing down the process, helped to maintain a high level of ambition and to add key and innovative dimensions: human rights defenders in environmental matters; the obligation to establish a list of polluted areas, by pollutant type and location; the principles of non-regression and prevention; and instruments and mechanisms that expand and facilitate access to justice in environmental matters.

3. CONCLUSION

Twenty years after the signing of the Aarhus Convention, while environmental and climate multilateralism is sometimes called into question, the signing of the Escazú Agreement is a step towards strengthening environmental democracy in Latin America and the Caribbean by recognizing the interdependence between human rights and the environment, and through its provisions regarding human rights defenders in environmental matters. It reflects a willingness of the countries in the region to act in a coordinated way for greater environmental protection and stronger environmental rights, especially for the most vulnerable populations. The Escazú experience also highlights the importance and added value of effective public participation in negotiations. This participation, with the support of regional and international expertise, has enabled actors in the negotiation process to reach a shared vision of the issues and to maintain a high level of ambition throughout the discussions.

To enter into force, and for effective implementation of Principle 10 in the region, the agreement must now be ratified by at least 11 countries by September 2020. To date, 16 countries have signed it, but it has not yet been ratified by any of them. Paradoxically, Chile, which started the process, has neither signed or ratified the agreement, paralyzed by its diplomatic dispute with Bolivia over access to the sea (the judgment of the International Court of Justice was announced on 1st October, the week following the Agreement's signing ceremony). Two countries (Haiti and Guyana) signed it without participating in the negotiations.

In addition, Latin America and the Caribbean face many challenges for the full implementation of these rights, which differ greatly from country to country; for some, the adoption of new laws will be necessary, while for others, it is more a question of changing practices. The public role will be essential; the network that has directly or indirectly followed the negotiations now constitutes a solid group of actors, organizations and experts able to push for the ratification of the Agreement and its effective implementation.

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